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IN THE

# Supreme Court of the United States

October Term, 1954
No. 455

WALTER L. IRVIN,

*Petitioner,*

v.

L. F. CHAPMAN, Superintendent of Raiford State Penitentiary, Raiford, Florida,

*Respondent.*

## PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

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*Respondent.*

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## PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

*To the Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:*

Petitioner prays that a writ of certiorari issue to review the judgment of the Supreme Court of Florida entered in the above-entitled case on November 5, 1954.

### Citations to Opinions Below

The opinion of the Supreme Court of Florida is unreported and is printed in the Appendix hereto, pages 14-17.

### Jurisdiction

The judgment of the Supreme Court of Florida, denying an original petition herein for writ of habeas corpus, was entered on November 5, 1954 (Appendix, p. 14). The

court below simultaneously denied an alternative petition for a stay of execution pending application for a writ of certiorari to this Court (Appendix, p. 17). Petitioner, on November 5, 1954, applied to this Court for a stay of execution pending the filing and disposition of a petition for writ of certiorari. On November 6, 1954, this Court entered an order staying petitioner's execution pending the filing and disposition of a petition for certiorari to review the judgment of the court below, provided said petition is filed on or before November 20, 1954.

## Question Presented

Whether, upon original petition for habeas corpus in the Supreme Court of Florida—alleging that petitioner's conviction and death sentence for rape are based upon a trial, conducted in an atmosphere of public and official hostility, in which the state used perjured and fabricated evidence and suppressed other evidence material to petitioner's defense, which allegations are not controverted by the state—the court below erred in denying the petition upon the grounds (1) that its previous affirmance of the conviction upon appeal forecloses further adjudication of the issues raised and (2) the petition raises no federal question.

## Statement of the Case [1]

Petitioner and a co-defendant, Samuel Shepherd, were convicted of the crime of rape and sentenced to death in

[1] The transcript of record herein, pursuant to Rule 21, paragraph 1, consists of the Petition for a Writ of Habeas Corpus and Exhibit A attached thereto; the Alternative Petition for Stay of Execution; and the Opinion of the Supreme Court of Florida. The Petition and the Opinion are reprinted in the Appendix hereto, *infra*, pp. 1 and 14.

the Circuit Court of the Fifth Judicial Circuit of the State of Florida, in and for Lake County, on September 8, 1949. The Supreme Court of Florida unanimously affirmed. *Shepherd* v. *State,* 46 So. 2d 880. This Court, in a per curiam opinion, unanimously reversed. *Shepherd* v. *Florida,* 341 U. S. 50.[2]

Petitioner and his co-defendant again were indicted for rape on July 6, 1951, and, after the co-defendant was killed and petitioner seriously wounded under circumstances set forth in petitioner's affidavit attached to his Petition for Habeas Corpus herein (Appendix, pp. 12-13), petitioner was tried in the Circuit Court of the Fifth Judicial Circuit of the State of Florida, in and for Marion County, before a jury which returned a verdict of guilty, without recommendation of mercy, on February 14, 1952. On the same day the court sentenced petitioner to die by electrocution. A motion for new trial was denied on March 11, 1952. On appeal, the Supreme Court of Florida affirmed the conviction on June 23, 1953. *Irvin* v. *State,* 66 So. 2d 288. This Court denied a petition for certiorari on January 4, 1954. *Irvin* v. *Florida,* 346 U. S. 927, reh. den. 347 U. S. 914.

By an original action in the Supreme Court of Florida petitioner sought a writ of habeas corpus against the superintendent of the state prison, his custodian, alleging that his detention and restraint were unlawful in that the judgment and sentence under pretext of which petitioner was being held were "illegal and void as contrary to the Fourteenth Amendment to the Constitution of the United States forbidding any state to deprive any person of life [or liberty] without due process of law" (Appendix, pp. 1-2).

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[2] The late Mr. Justice Jackson, concurring in the result, in an opinion in which Mr. Justice Frankfurter joined, stated that "The case [in consideration of the conditions under which the trial took place and accompanying events] presents one of the best examples of one of the worst menaces to American justice." 341 U. S. 50, 55.

The original petition for habeas corpus in the court below recited the proceedings and events since his arrest, and alleged in support of his contention that his conviction and sentence were "illegal, void and in violation of the Fourteenth Amendment of the United States Constitution . . .", the following reasons: (1) that his trial was conducted in an atmosphere of severe hostility and the refusal of the trial court to grant petitioner's motion for a change of venue denied him the possibility of a fair trial (Appendix, p. 4); (2) that the trial court's refusal to allow petitioner to introduce, at the hearing on his motion for change of venue, evidence of the results of a public opinion survey made by the Elmo Roper Agency precluded petitioner from introducing substantial proof of the extent of the hostility pervading Marion County and the impossibility of petitioner's obtaining a fair trial therein (Appendix, p. 6); (3) that petitioner was convicted by the use of evidence obtained by an unlawful search and seizure (Appendix, p. 7); (4) that petitioner was convicted by the use of evidence which was patently false and knowingly contrived by state officials (Appendix, p. 7); and (5) that the totality of errors committed at petitioner's trial including: (a) acts of prejudicial misconduct on the part of the prosecutor, such as invidious references to petitioner's race (Appendix, pp. 7-8); erroneous, prejudicial and highly unfair assertions about defense counsel (Appendix, p. 8); assertion of the prosecutor's personal belief in petitioner's guilt and references to his [the prosecutor's] ill health (Appendix, p. 8); (b) the State's constructive suppression of evidence by refusing to obtain accurate scientific analysis, available to the State, of raw physical evidence which was found (Appendix, pp. 8-9). The petition further alleged that the sheriff's deliberate killing of petitioner's co-defendant, Shepherd, resulted in the suppression of evidence which Shepherd could have given on behalf of petitioner and which would have proved petitioner's innocence of the crime with which he was charged (Appendix, p. 9);

and that the state constructively suppressed evidence by refusing to have the medical doctor who had examined the alleged rape victim early the same morning the alleged rape was supposed to have occurred, testify for the reason that said doctor, upon the basis of petitioner's information and belief, would have testified that the prosecutrix had not been raped (Appendix, pp. 9-10).

The respondent filed no pleading in the court below, and that court, upon examination of the petition unanimously denied the petition upon the grounds (1) that, "with the exception of certain matters hereinafter noted, the petitioner has alleged no facts in his petition that have not heretofore been set at rest by this Court on an appeal from the judgment and sentence entered in the original cause * * * Therefore, such matter is not now open for adjudication" (Appendix, pp. 14-15); (2) that, having failed to offer in evidence at petitioner's second trial the transcribed testimony by Shepherd at the first trial, as provided under Section 920.09, Florida Statutes 1951, "petitioner is foreclosed from now raising the question as to what testimony Shepherd might have given at the second trial had he lived and elected to take the stand and give testimony in behalf of the petitioner" (Appendix, p. 16); and (3) the petition showing only that "petitioner believes that if the doctor had been called he might have given testimony favorable to his cause * * * it is entirely immaterial that the state did not call the medical doctor as a witness, because the defendant, petitioner in this proceeding, was free to do so. Furthermore * * * [the petitioner having asserted no reason for] his failure to raise on the prior appeal the ground now asserted for the first time in his petition for habeas corpus * * * it must be held, under the decisions, that he has waived or forfeited the right to raise the issue by his failure to make timely assertion thereof" (Appendix, pp. 16-17).

In denying petitioner's alternative application for a stay of execution to enable petitioner to seek a review of

its judgment by certiorari, the court below said: "We find no federal question involved in this controversy, and consequently the application for stay should be denied" (Appendix, p. 17).

## Reasons for Allowance of the Writ

The respondent filed no pleading in response to the petition for writ of habeas corpus in the court below. Thus, the allegations of the petition stand uncontroverted. The Supreme Court of Florida appears to have treated the matter as if on motion to dismiss or demurrer. Consequently, the allegations of the petition must be accepted as true. *Moore* v. *Dempsey,* 261 U. S. 86, 87.

## I

**The allegations in a petition for writ of habeas corpus of the prosecution's knowing use of fabricated evidence and perjured testimony, not controverted by respondent, require granting of the writ. The decision of the Supreme Court of Florida below to the contrary is probably not in accord with the applicable decisions of this Court.**

Petitioner alleged in the court below that his conviction was based upon evidence which was patently false and knowingly contrived by state officials (Appendix, p. 7). These allegations were not controverted in the court below.

The footprint casts made by Deputy Sheriff Yates were alleged to be patently false because, among other things, it is impossible that the original footprints, from which the casts were made, were made by a shoe with a foot in it. The sole of every shoe when worn on the foot makes a concave impression on the ground. The footprints which were the subject of this testimony were convex, and thus neces-

sarily false and contrived. By knowingly using such evidence petitioner alleged that the state deprived him of a fair trial and thus denied him due process of law (Appendix, p. 7).

Knowing use by the prosecutor of perjured testimony in a state criminal prosecution was first held to violate that due process of law required by the 14th Amendment in *Mooney* v. *Holohan,* 294 U. S. 103. There the court said:[1]

> That requirement [of due process] . . . cannot be deemed to be satisfied by mere notice and hearing if a State has contrived a conviction through pretense of a trial which in truth is but used as a means of depriving a defendant of liberty through a deliberate deception of court and jury by the presentation of testimony known to be perjured. Such a contrivance by a State to procure the conviction and imprisonment of a defendant is as inconsistent with the rudimentary demands of justice as the obtaining of a like result by intimidation.

This Court has often reaffirmed this proposition. *Pyle* v. *Kansas,* 317 U. S. 213, 215-216; *White* v. *Ragen,* 324 U. S. 760, 764; see also *Hysler* v. *Florida,* 314 U. S. 411, 413.

In *Pyle* v. *Kansas, supra,* the specific allegations of knowing use of perjured testimony were contained in exhibits that were not sworn to. This Court, pointing out that the allegations were "nowhere . . . refuted or denied . . .",[2] remanded the case for hearing. In *James* v. *U. S.,* 175 F. 2d 769, it was held that mere allegations of the knowing use of perjured testimony entitled a person to a hearing. In the instant case, the pertinent allegations were contained in the sworn petition for writ of habeas

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[1] 294 U. S. 103, 112.

[2] 317 U. S. 213, 216.

corpus in the court below and, as previously indicated, they were not controverted by the respondent. The court below, apparently relying upon the fact that this issue was raised upon the trial of petitioner and apparently was submitted to the trial jury and resolved by its general verdict of guilty, contended that its affirmance of that verdict precluded further adjudication of the issue upon the petition below.

In *Hysler* v. *Florida, supra,* this Court stated that a petition charging knowing use of perjured testimony might be denied by a state court pursuant to its rule of law requiring that it must look at the reasonableness of the allegations, the possibility of their truth, and their substantiality. Accordingly, this Court found in the *Hysler* case that there was "no doubt that the finding of insubstantiality was justified."[3] However, the opinion below in the instant case does not indicate that the court reviewed the evidence or concluded that the uncontroverted allegations in the petition for habeas corpus were insubstantial or beyond belief. As previously noted these allegations were sworn to and in light of their physical basis obviously were substantial.

The dissenting justices in the *Hysler* case noted that:

> It must also be borne in mind that if the proof accompanying the petition for leave to apply for a writ of error *coram nobis* had to be so full as to establish conclusively the truth of the allegations, petitioners who required the amplifying or corroborative evidence of inaccessible or unwilling witnesses would be effectively barred from access to this remedy, for they would never have the opportunity to utilize the compulsory process which a trial of the facts would afford.[4]

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[3] 315 U. S. 411, 422.

[4] 315 U. S. 411, 426.

In the instant case, the evidence necessary to support petitioner's allegations, obviously would not be available except upon a hearing of the facts by the court below. Having denied petitioner the opportunity to compel the production of such evidence in the court below, the court below would be unable to ascertain by a mere review of the conviction in the trial court, the weight and sufficiency accorded such evidence before the jury, and it is submitted that such review cannot foreclose the petitioner's right to have this issue adjudicated upon his petition for habeas corpus.

## II.

**The allegations of a petition for writ of habeas corpus that in a state criminal prosecution evidence beneficial to defendant was suppressed, require the granting of the writ. This question has not previously been decided by this Court.**

The uncontroverted allegations of the petition below set forth (a) that the State engaged in a constructive suppression of evidence by refusing to obtain and introduce available scientific analysis of pertinent raw physical evidence [*e.g.*, a smear upon petitioner's trousers, impliedly semen; "lint" found near the scene of the alleged crime which, according to testimony, was similar to that found in co-defendant Shepherd's automobile; plaster casts of tire tracks] (Appendix, pp. 8-9); (b) that the State engaged in constructive suppression of evidence by refusing to have the medical doctor testify who had examined the prosecutrix early the same morning the alleged rape was supposed to have occurred, and petitioner, based upon information and belief, believes that the state suppressed the testimony of the medical doctor because said medical doctor would have testified that the prosecutrix had not been raped (Appendix, pp. 9-10); and (c) that Sheriff McCall's

deliberate killing of co-defendant Samuel Shepherd resulted in the suppression of evidence which Shepherd could have given on behalf of the petitioner and which would have proved petitioner's innocence of the crime with which he was charged (Appendix, p. 9).

The court below ignored, in its opinion, the allegation concerning constructive suppression of scientific analysis pertaining to the physical evidence. It disposed of the allegations with reference to suppression of the doctor's testimony by shifting the responsibility to the petitioner (Appendix, pp. 16-17).

As to the constructive suppression of evidence in the form of testimony which petitioner expected to offer by Samuel Shepherd, who was killed by the Sheriff before trial, the court below says:

> As to this point, the records of this Court, of which we take judicial notice, show that at the first trial of this cause the co-defendant Shepherd was sworn and testified in full detail as to the activities in which he and the petitioner were engaged. Sec. 920.09, Florida Statutes 1951, provides that when a new trial is granted in a criminal case such new trial shall proceed in all respects as if no former trial had been had; except that if witnesses used on the first trial are dead at the time of the second trial "The evidence of such witnesses on former trial may be presented as the same was taken by the court reporter."
>
> The records of this Court show also that on the second trial of this cause in the court below, no effort was ever made by the petitioner to introduce into evidence a transcribed copy of the evidence given at the former trial by the decedent Shepherd. Having failed to introduce this evidence at the second trial, the petitioner is foreclosed from now raising the question as to what testimony Shepherd might have

given at the second trial had he lived and elected to take the stand and give testimony in behalf of the petitioner. State ex rel. Johnson v. Mayo (Fla.), 69 So. 2d 307, certiorari denied 347 U. S. 992, 98 L. Ed. 722, 74 S. Ct. 855.

It appears that this Court never has squarely held that suppression of evidence in a state criminal prosecution violates the Fourteenth Amendment. However, it would appear that the holdings in *Mooney* v. *Holohan, Pyle* v. *Kansas,* and *White* v. *Ragen, supra,* are sufficiently broad to support such proposition. Thus, in *Pyle* v. *Kansas,* the Court held merely that knowing use by the prosecution of perjured testimony *plus* deliberate suppression amounted to a denial of due process.[1] Two United States Courts of Appeals and one federal district court have held suppression of evidence by the prosecution in a state criminal trial amounts to a denial of due process of law.[2]

The conclusion by the court below that petitioner's failure to avail himself of the statutory provisions allowing use of the previously transcribed testimony of a deceased witness forecloses his raising the point as a denial of due process in his petition for habeas corpus, blandly circumvents the allegation that the State itself, by its agent, Sheriff McCall, was responsible for the death and unavailability of this witness.

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[1] See also *United States* v. *Berger,* 295 U. S. 78, to the effect that even the prosecuting attorney must make the vital facts of the case known.

[2] *United States* v. *Rutkin,* 212 F. 2d 641; *United States* v. *Baldi,* 195 F. 2d 815, cert. den. 345 U. S. 904; *United States* v. *Ragen,* 86 F. Supp. 382.

## III.

**The conclusion by the Court below that no federal question is involved in the matter raised by the petition for writ of habeas corpus is probably in conflict with decisions by this Court.**

The court below, in denying petitioner's application for a stay of execution pending an effort to obtain review on certiorari of its denial of the petition for habeas corpus, says: "We find no federal question involved in this controversy * * *" (Appendix, p. 17). But such a recital cannot bind this Court. *Brown* v. *Western Railway Co.*, 338 U. S. 294, 296; *Radio Station WOW, Inc.* v. *Johnson*, 326 U. S. 120, 129.[1]

In *Frank* v. *Mangum*, 237 U. S. 309, this Court said, at page 332:

> Now the obligation resting upon us * * * to look through the form and into the very heart and substance of the matter, applies as well to the averments of the petition as to the proceedings which the petition attacks. We must regard not any single clause or paragraph, but the entire petition, and the exhibits that are made a part of it.

The proper inquiry then, it would appear, is whether the uncontroverted averments of the petition below and the other factual material before this Court demonstrate a denial of due process. To this end, even those issues which may have been previously adjudicated, or which may be procedurally foreclosed to petitioner, are entitled to consideration in an evaluation of whether, upon the whole record, there was a denial of a fair trial.

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[1] See also Robertson and Kirkham, Jurisdiction of Supreme Court of the United States, §96.

Consquently, when the court below refers to the matter as having been adjudicated on an earlier occasion, it says that when it affirms a jury's finding of guilty—even though testimony perjured by the hand of the State has been introduced at the trial and the State has suppressed evidence favorable to defendant—the proceedings are insulated by the general verdict against collateral attack.

But this Court has held otherwise. *Mooney* v. *Holohan, supra; Pyle* v. *Kansas, supra; Rochin* v. *California,* 342 U. S. 165; *Malinsky* v. *New York,* 324 U. S. 401; *Cassell* v. *Texas,* 339 U. S. 282; *Brown* v. *Allen,* 344 U. S. 443. Indeed in *Brown* v. *Allen,* this Court only recently went to great pains to examine whether the judgments under review contained fatal constitutional flaws where such questions had been raised in the proceedings which led to the convictions.

Upon this Court's *per curiam* reversal of petitioner's first conviction and sentence herein, the late Mr. Justice Jackson, concurring in the result, in an opinion in which he was joined by Mr. Justice Frankfurter, wrote:[2]

> But prejudicial influences outside the courtroom, becoming all too typical of a highly publicized trial, were brought to bear on this jury with such force that the conclusion is inescapable that these defendants were prejudged as guilty and the trial was but a legal gesture to register a verdict already dictated by the press and the public opinion which it generated.

Among the "prejudicial influences outside the courtroom", discussed in the opinion, were statements attributed to Lake County Sheriff McCall who had the prisoners in custody; the inflammatory press reports concerning the crime and the case; and the atmosphere of hostility and potential

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[2] 341 U. S. 50, 51.

violence which led the trial judge to take extraordinary precautions in preparation for and during the trial.[3]

The circumstances and events accompanying petitioner's second trial strongly indicate the presence in Marion County, contiguous to Lake County, of similar, if not stronger, "prejudicial influences" than those previously condemned.

The petition for habeas corpus alleged (Appendix, p. 6) and stands uncontroverted that the newspapers in Marion County, where petitioner's second trial was held, reported the same passion-arousing events mentioned in Mr. Justice Jackson's opinion, *supra*. In addition, the petition alleges that the local press reported, following this Court's reversal of the previous conviction, that the Sheriff of Lake County publicly said this Court had bowed "to subversive influences" (Appendix, p. 5); that the State's Attorney, several months prior to the second trial, "charged publicly that petitioner's counsel of choice represented an organization which had 'been responsible for vicious, slanderous and libelous matter filed in this Court * * *'" (Appendix, p. 5); that Sheriff McCall and one of his deputies shot and killed petitioner's co-defendant and seriously wounded petitioner, while the two were handcuffed together being transported by the Sheriff from the prison to court and, despite the wide-spread publicity given this incident and its gravity, there was no grand jury investigation and the coroner's jury found that the shootings were justifiable (Appendix, pp. 5-6); and that in another part of the State, the home of a Negro, an official of the organization identified with this case, was bombed and he and his wife were killed (Appendix, p. 6).

The public opinion survey which petitioner unsuccessfully sought to have considered as evidence upon his motion for change of venue, showed, as alleged in the petition below (Petition, 6), that "sixty-three percent of the popu-

[3] *Ibid*, pp. 51-53.

lation of Marion County either thought or were certain that petitioner was guilty and that eighty-three percent of Marion County's Negro population feared that if a member of the jury voted for acquittal, 'something would happen' to him" (Appendix, p. 6).

The introduction into evidence of the false and manufactured testimony and the suppression of evidence on the part of the State must be read in the context of the "prejudicial influences outside the courtroom" described above.

WHEREFORE, for the foregoing reasons, the judgment below should be reversed.

Respectfully submitted,

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## APPENDIX

### Petition for a Writ of Habeas Corpus

IN THE STATE SUPREME COURT

STATE OF FLORIDA

—o—

WALTER LEE IRVIN,

Petitioner,

vs.

L. F. CHAPMAN, Superintendent of State Prison,

Respondent.

—o—

*To the Honorable Chief Justice and Associate Justices:*

The petition of Walter Lee Irvin respectfully shows:

I. Petitioner is a citizen of the United States and of the State of Florida.

II. Petitioner makes application herein for a writ of habeas corpus in that he is unlawfully detained and restrained in his liberty by L. F. Chapman, Superintendent of the State Prison and is now in custody of L. F. Chapman, Superintendent, State Prison at Raiford, Florida.

III. The cause or pretext of such detention and restraint is the judgment and sentence of death pronounced upon petitioner by the Circuit Court of the Fifth Judicial Circuit of the State of Florida, in and for Marion County, on February 14, 1952, upon conviction of the crime of rape.

IV. Said detention and restraint is unlawful in that the judgment and sentence are illegal and void as contrary to

the Fourteenth Amendment to the Constitution of the United States forbidding any state to deprive any person of life without due process of law. The judgment and sentence are further illegal and void in that they are contrary to section 12 of the Declaration of Rights to the Florida Constitution.

V. Petitioner, a Negro, was arrested on July 16, 1949, and indicted on July 20, 1949 for the rape of Norma Padgett, a white girl. Arraigned on August 12, 1949, petitioner pleaded not guilty. Petitioner was tried before a jury from August 29 to September 3, 1949, found guilty and sentenced to death. On May 16, 1950, the Supreme Court of Florida affirmed this conviction. On writ of certiorari, the United States Supreme Court on April 9, 1951 reversed the judgment and ordered a new trial.

VI. Petitioner and co-defendant Samuel Shepherd were again indicted for rape on July 6, 1951. Arraigned on August 23, 1951, the petitioner and his co-defendant pleaded not guilty.

On October 17, 1951 petitioner and his co-defendant filed in the Circuit Court of the Fifth Judicial Circuit in and for the County of Lake an application for removal of cause, stating that they were Negroes, and that the prejudice of a great number of Lake County's citizens made them fear that a fair trial would be impossible in Lake County (TR. 20-35).*

On the same day, October 17, 1951, petitioner and his co-defendant also filed a motion to suppress certain evidence on the ground that it was obtained by an unlawful

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* The record in the case of Irvin v. Florida is referred to in the following manner: "TR." refers to the transcript of record. "R." refers to the transcript of testimony. "Ex." refers to exhibits in the above case, except that "Ex. A" and "Ex. B" refer to exhibits to this petition and are here attached.

search and seizure contrary to the Constitution of the United States and the Constitution and laws of Florida (TR. 43-46).

Before said motions could be heard, Samuel Shepherd was killed and petitioner seriously wounded on November 6, 1951, while they were being transported from the state penitentiary at Raiford to Tavares for proceedings herein. On December 3, 1951, petitioner filed an amendment to his application for removal of cause, stating that on the night of November 6, 1951, Willis V. McCall, sheriff of Lake County, murdered co-defendant Shepherd and that Sheriff McCall, aided by his deputy, Yates, seriously wounded petitioner in an attempt to murder him (TR. 100-109).

On December 6, 1951 at the suggestion of the state's attorney, the cause was removed to Marion County, Florida (TR. 118).

On February 2, 1952, petitioner filed a motion for removal of cause from the Circuit Court for the Fifth Judicial Circuit in and for Marion County, alleging that for reasons therein described, the sentiment in that County was little different from that in Lake County (TR. 208-230). Said motion reviewed the long history of violence and hostility that surrounded this case, the prejudicial public statements of state officials and the recent incident wherein Samuel Shepherd was murdered and petitioner seriously wounded by state officials.

This application was heard by the Court on February 11, 1952. At that time, defendant sought to introduce evidence of a public opinion poll concerning the opinions of Marion County citizens as to petitioner's guilt or innocence and the opinions of these citizens with respect to the possibility that violent reprisals would be taken against any member of the jury voting for acquittal. This testimony was excluded over petitioner's objection and the motion for a change of venue from Marion County was denied (R. 46-52, 55-57).

On the same day, February 11, 1952, the Court also denied petitioner's motion to suppress (R. 165).

Petitioner was tried before a jury, which returned a verdict of guilty on February 14, 1952. On the same day, the Court pronounced the sentence of death by electrocution. A motion for new trial was denied on March 11, 1952. On appeal, the Supreme Court of Florida affirmed the conviction on June 23, 1953. The United States Supreme Court then denied certiorari on January 4, 1954 and denied a petition for rehearing on February 1, 1954.

VII. Petitioner's conviction and sentence are illegal, void and in violation of the Fourteenth Amendment of the United States Constitution and Section 12 of the Declaration of Rights to the Florida Constitution for the following reasons:

A. Petitioner's trial was conducted in an atmosphere of severe hostility. The refusal of the Circuit Court for the Fifth Judicial Circuit in and for Marion County to grant petitioner's motion for a change of venue denied petitioner the possibility of a fair trial.

(1) At the time of the first trial, the entire community was infested with violence and prejudice. A mob gathered outside the county jail where petitioner and his co-defendants were incarcerated and demanded that the men be turned over to them. A mob burned down the home of defendant Shepherd's father and mother and the homes of two other Negro families. The National Guard was called out on July 17 and July 18, 1949 and on July 19, 1949 the 116th Field Artillery was summoned to Tampa as Negroes abandoned their homes and fled. The press covered these events with passion-arousing headlines. (Defendant's Ex. 2 and 3; concurring opinion of Mr. Justice Jackson, 341 U. S. at p. 50).

The newspapers also reported the apparent assertion of the Sheriff of Lake County that petitioner had con-

fessed, although no confession was ever introduced against him (Defendant's Ex. 2).

(2) This atmosphere of hostility persisted following the decision of the United States Supreme Court reversing petitioner's first conviction. Following this decision, the Sheriff of Lake County said publicly that the Supreme Court had bowed "to subversive influences." This was carried by the local press (Defendant's Ex. 11).

(3) In November, 1951, several months prior to the second trial, the State Attorney charged publicly that petitioner's counsel of choice represented an organization which had "been responsible for vicious, slanderous and libelous matter filed in this court. . . ." (TR. 124). This statement further prejudiced the atmosphere.

(4) On November 6, 1951, Sheriff McCall of Lake County shot and killed Samuel Shepherd, petitioner's co-defendant. At the same time, Sheriff McCall, aided by Deputy Sheriff Yates, shot and wounded petitioner in an attempt to kill him. Petitioner alleges and wishes to prove that both of these acts were done without justifiable cause—that he and his co-defendant, while handcuffed together and alone with the Sheriff on a dark road at night, were deliberately and without provocation shot by the Sheriff and his deputy (Ex. A here attached).

In sworn statements before a special investigator for the Governor of Florida and before the coroner's inquest, petitioner stated the above facts (TR. 104-108). Despite the gravity of the question, however, no grand jury investigation followed because petitioner and his co-defendant were so odious to the community-at-large that no one either cared or was sufficiently courageous to initiate the customary proceedings in the matter.

The coroner's inquest, which found that the shootings were justifiable, was a contrived hearing and was patently unfair. At the inquiry, one of the coroner's jurors, before

hearing any evidence, expressed the conclusion that petitioner and his co-defendant were justifiably shot (TR. 101, 113).

The finding of the coroner's inquest constituted a formal adjudication by the State that petitioner was an attempted escapee. Such an unfair adjudication seriously prejudiced public opinion against petitioner.

(5) On December 25, 1951, in another part of the State of Florida, Harry T. Moore, an official of the association which aided petitioner's defense, and his wife, were killed by the bombing of their home. This further intimidated persons who viewed petitioner's case impartially.

(6) Marion County is contiguous to Lake County and all the above events were reported in the Marion County press.

(7) The state of public opinion in Marion County at the time of petitioner's trial was such that petitioner could not receive a fair trial. A public opinion survey conducted by one of the most reputable and impartial public opinion research organizations, the Elmo Roper Agency, shows that sixty-three percent of the population of Marion County either thought or were certain that petitioner was guilty and that eighty-three percent of Marion County's Negro population feared that if a member of the jury voted for acquittal, "something would happen" to him (Ex. B here attached, pp. 22, 23, 27, 31, 35).

B. The refusal of the Circuit Court for the Fifth Judicial Circuit in and for Marion County to allow petitioner to introduce the results of the above-mentioned public opinion poll precluded petitioner from introducing substantial proof of the extent of the hostility pervading Marion County and the impossibility of petitioner's obtaining a fair trial. All of the allegations contained in paragraph VII. A above are incorporated herein.

C. Petitioner was convicted by the use of evidence obtained by an unlawful search and seizure. On July 16, 1949, Deputy Sheriff Yates appeared at petitioner's mother's home, where petitioner rented a room, and demanded of her a pair of shoes and a pair of trousers belonging to petitioner, stating that he "came for that little black nigger boy's clothes." The Deputy Sheriff had no search warrant although he had sufficient time to obtain one. Petitioner's mother, a Negro, ignorant and unlearned in matters of law, was coerced by the presence of an official and complied with the request (R. 143-153, 157).

D. Petitioner was convicted by the use of evidence which was patently false and knowingly contrived by state officials.

The footprint casts made by Deputy Sheriff Yates are patently false because it is impossible that the original footprints, from which the casts were made, were made by a shoe with a foot in it. The sole of every shoe when worn on the foot makes a concave impression on the ground. The footprints which were the subject of the testimony at the trial were convex, and thus necessarily false and contrived (R. 436, 437). By knowingly using such evidence, the State deprived petitioner of a fair trial and thus denied him due process of law.

E. The totality of errors committed at petitioner's trial deprived him of a fair trial.

Petitioner incorporates herein each and every allegation made in Paragraph VII A, B, C and D.

Petitioner further alleges other seriously prejudicial errors, to wit:

(1) Various acts of prejudicial misconduct on the part of the Prosecutor denied petitioner a fair trial. In his closing agrument, the Prosecutor made invidious references (R. 510, 516) to petitioner's race when he declared, inter

alia, "... don't you know that is the colored way of thinking" (R. 516).

The Prosecutor made an erroneous, prejudicial and highly unfair assertion about defense counsel when he stated that "by a technicality he (defense counsel) stopped me from proving it" (R. 508). ... This assertion was considered by the Supreme Court of Florida to be erroneous and the refusal of the trial court to instruct the jury to disregard this remark was likewise considered error by that court.

The Prosecutor seriously prejudiced petitioner when he asserted his personal belief in petitioner's guilt and when he referred to his ill health in order to evoke sympathy (R. 505-506, 518).

In view of the hostile atmosphere which had long surrounded this case and in view of the allegations contained in Paragraph VII A of this petition, the Prosecutor seriously prejudiced petitioner by referring in his closing statement to the help obtained by petitioner from outside the state and by asserting that "... any negro can get a fair trial in Marion County, if the outside world would just leave us alone ..." (R. 504).

(2) The State engaged in a constructive suppression of evidence by refusing to obtain accurate scientific analysis of the raw physical evidence which was found. Such scientific analysis was available to local law enforcement officials.

The state introduced into evidence petitioner's trousers containing a smear thereon (State Ex. 3, R. 356-357). The implication of this evidence was that the smear was a semen stain. The State refused, however, to secure available scientific analysis in order to determine accurately whether the stain was in fact semen.

The state introduced into evidence "lint" found near the scene of the alleged crime. There was testimony that

this "lint" was similar to that found in co-defendant's Shepherd automobile. The State, however, failed to secure accurate scientific anaylsis necessary to make a true comparison (State's Ex. 2, R. 354-356).

Plaster casts of tire tracks were made by Deputy Sheriff Yates.

The State failed here again to secure an accurate scientific analysis which would take into consideration such highly pertinent factors as evidence of wear, air bells, wear by gravel or stone, etc. (R. 431, 352-353, 365-366).

By refusing to obtain accurate scientific analysis of the raw physical evidence and by introducing third grade evidence of practically no probative value but full of prejudicial innuendoes, the State denied petitioner a fair trial and thus denied him due process of law.

VIII. The cumulative effect of each of the violations of petitioner's fundamental rights as set forth in Paragraph VII rendered petitioner's trial a mask for the denial of his constitutional rights guaranteed in the Fourteenth Amendment to the United States Constitution and Section 12 of the Declaration of Rights to the Florida Constitution.

IX. Sheriff McCall's deliberate killing of Samuel Shepherd resulted in the suppression of evidence which Samuel Shepherd could have given on behalf of petitioner herein and which would have proved petitioner's innocence of the crime which he was charged.

X. The State engaged in a constructive suppression of evidence by refusing to have the medical doctor testify who had examined Norma Padgett early the same morning the alleged rape was supposed to have occurred, and your petitioner based upon information and belief, believes that

the State suppressed the testimony of the medical doctor because the said medical doctor would have testified that Norma Padgett had not been raped.

WHEREFORE, petitioner prays that a writ of habeas corpus issued herein directed to the said L. F. Chapman, Superintendent of the State Prison, commanding him to produce the body of the petitioner Walter Lee Irvin before this court at a time and place to be specified in said writ, to the end that this court may inquire into the cause of the petitioner's detention, and that the petitioner be ordered discharged from the detention and restraint aforesaid.

Dated this 3rd day of November, 1954.

WALTER LEE IRVIN,
Petitioner.

PAUL C. PERKINS, Esq.,
647 West South Street,
Orlando, Florida,

THURGOOD MARSHALL, JACK GREENBERG,
107 West 43rd Street,
New York, New York,

*Attorneys for Petitioner.*

STATE OF FLORIDA }
COUNTY OF ORANGE } ss.:

WALTER LEE IRVIN, being duly sworn, deposes and says that he is the petitioner named in the foregoing petition subscribed by him; that he has read the same and knows the contents thereof; and that the same is true to his own knowledge, except as to those matters therein alleged on information and belief, and as to those matters he believes them to be true.

WALTER LEE IRVIN.

Subscribed and sworn to before me
this 3rd day of November, 1954.

.....
Notary Public, State of Florida at Large.

Notary Public, State of Florida at large
My commission expires Jan. 6, 1957.
Bonded by American Surety Co. of N. Y.

(SEAL)

## Exhibit A

STATE OF FLORIDA
COUNTY OF ORANGE

I, WALTER LEE IRVIN, being duly sworn, deposes and says:

That on November 6, 1951, after dark, Sheriff McCall and Deputy Sheriff Yates came to Raiford to pick up Samuel Shepherd and me. We got into the sheriff's car. At Wiersdale, Deputy Sheriff Yates got into another car, but Shepherd and myself stayed in the sheriff's car. We were handcuffed together in the front seat. Shepherd was on the outside and I was in the middle.

Before we got started again the deputy went to see whether the car would start. He cranked it and it started. At Wiersdale, where there is a school, there is a clay road that turns off the highway. The deputy sheriff turned off onto that road and the sheriff followed. We went on that road a short distance; I do not know how far. The sheriff and the deputy were talking on the radio.

The deputy sheriff turned off to the right. I do not know where he went. We turned off to the right and went on down the road apiece until the sheriff began to shimmy his wheels. The sheriff pulled off to the side and stopped, stating that, "something is wrong with my left front tire." He got a flashlight with a red band from under the seat on the floor board, got out of the car and checked the tires. He then came back into the car and said that he could not find anything wrong. He drove about two more miles and then stopped again. The wheels started shimmying again. The sheriff got out of the car again with his flashlight, kicked the right front wheel and then came around to where Shepherd was sitting on the righthand side of the car. The sheriff then said, "You SOB's get out and get this tire fixed." I did not see any tires in the back, but we had to

obey because he was the sheriff. We then went to get out. The sheriff then fired right quick at Shepherd and then he fired at me hitting me in my chest. He then grabbed me by the clothes and threw me to the ground. He also threw Shepherd to the ground. I did not say anything. He then shot me again in the shoulder, but I still did not say anything.

I then heard him say, "I got rid of them, killed the SOB's." The sheriff then ran around to the car and called the deputy sheriff on the radio. I heard him say to the deputy, "Pull around here right quick, these SOB's tried to jump me and I did a good job."

The deputy sheriff soon came, pulled his car over to where the sheriff's car was parked and got out of the car. The deputy shined a light into my face and said to the sheriff, "That SOB is not dead; let's kill him." The deputy then pointed a pistol at me and pulled the trigger but the gun did not shoot. The deputy then took the pistol around to the car lights and looked at it. He then returned and fired at me. The bullet hit me in the neck and I began to bleed out of my nose. I still did not say anything; I did not let them know I was not dead.

I did not try to jump the sheriff. I did not try to escape that night.

(Signed) WALTER LEE IRVIN
Walter Lee Irvin

Subscribed and sworn to me this 3rd day of November, 1954, at Raiford, Florida.

PAUL C. PERKINS
Notary Public, State of Florida at large
My commission expires Jan. 6, 1958
Bonded by American Surety Co. of N. Y.

**Opinion of Sebring, *J.***

IN THE SUPREME COURT OF FLORIDA

JUNE TERM, A. D. 1954

EN BANC.

Case No. 25,436

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WALTER LEE IRVIN,

Petitioner,

vs.

L. F. CHAPMAN, Superintendent of State Prison,

Respondent.

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Opinion filed November 5, 1954.

A Case of Original Jurisdiction—Habeas Corpus.

PAUL C. PERKINS, THURGOOD MARSHALL and JACK GREENBERG, for Petitioner.

RICHARD W. ERVIN, Attorney General and REEVES BOWEN, Assistant Attorney General, for Respondent.

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SEBRING, *J.*

By this habeas corpus proceeding the petitioner attempts to question the legality of the judgment and sentence heretofore entered in this cause. From a study of the petition it appears that, with the exception of the matters hereinafter noted, the petitioner has alleged no facts in his peti-

tion that have not heretofore been set at rest by this Court on an appeal from the judgment and sentence entered in the original cause. See Irvin v. State (Fla.), 66 So. 2d 288, certiorari denied 346 U. S. 927, 98 L. Ed. 205, 74 S. Ct. 316, reh. den. 347 U. S. 914, 98 L. Ed. 353, 74 S. Ct. 479. Therefore, such matter is not now open for adjudication.

As to new matter which it is suggested by the petitioner should be sufficient to require that the judgment and sentence be set aside and a new trial awarded, the petitioner avers in his petition that subsequent to the first trial of the original cause—Shepherd et al. v. State (Fla.), 46 So. 2d 880, reversed by Supreme Court of United States, 341 U. S. 50, 95 L. Ed. 740, 71 St. Ct. 549, and remanded for new trial, 52 So. 2d 903—the sheriff of the county in which the crime is alleged to have occurred shot and killed one Samuel Shepherd, a codefendant in the case, which "resulted in the suppression of evidence which Samuel Shepherd could have given on behalf of petitioner herein and which could have proved petitioner's innocence of the crime for which he was charged."

As to this point, the records of this Court, of which we take judicial notice, show that at the first trial of this cause the codefendant Shepherd was sworn and testified in full detail as to the activities in which he and the petitioner were engaged. Section 920.09, Florida Statutes 1951, provides that when a new trial is granted in a criminal case such new trial shall proceed in all respects as if no former trial had been had; except that if witnesses used on the first trial are dead at the time of the second trial "the evidence of such witnesses on former trial may be presented as the same was taken by the court reporter."

The records of this Court show also that on the second trial of this cause in the court below, no effort was ever made by the petitioner to introduce into evidence a transcribed copy of the evidence given at the former trial by the decedent Shepherd. Having failed to introduce this

evidence at the second trial, the petitioner is foreclosed from now raising the question as to what testimony Shepherd might have given at the second trial had he lived and elected to take the stand and give testimony in behalf of the petitioner. State ex rel. Johnson v. Mayo (Fla.), 69 So. 2d 307, certiorari denied 347 U. S. 992, 98 L. Ed. 722, 74 S. Ct. 855.

The only other new matter that petitioner has attempted to inject into his petition as the basis for a new trial is the averment in the petition that upon the second trial of the cause in the court below "The State engaged in a constructive suppression of evidence by refusing to have the medical doctor testify who had examined the [victim of the alleged rape] early the same morning the alleged rape was supposed to have occurred, and your petitioner based upon information and belief, believes that the state suppressed the testimony of the medical doctor because the said medical doctor would have testified that [the victim of the alleged rape] had not been raped."

It takes nothing more than a casual inspection of this allegation to disclose that it does not constitute a sufficient predicate for the issuance of the writ. It is not shown, for example, that the petitioner did not know that the medical doctor had examined the victim of the rape. It is not shown that any effort was ever made by the petitioner to call the doctor as a witness to testify in his behalf. It is not shown that the medical doctor would have given testimony favorable to the petitioner had he been called to testify. All that is shown by the petition in this regard is that the petitioner *believes* that if the doctor had been called he might have given testimony favorable to his cause. Therefore, in the light of the tacit admissions in the allegations of the petition, it is entirely immaterial that the state did not call the medical doctor as a witness, because the defendant, petitioner in this proceeding, was free to do so.

Furthermore, while from aught that appears in the petition to the contrary, the petitioner might have known at the time of the second trial that the medical doctor had examined the victim of the rape, the petitioner has not made any attempt in his petition to give a reason for his failure to raise on the prior appeal the ground now asserted for the first time in his petition for habeas corpus. Therefore, it must be held, under the decisions, that he has waived or forfeited the right to raise the issue by his failure to make timely assertion thereof. State ex rel. Johnson v. Mayo, supra. Habeas corpus may not be used as a vehicle to raise for the first time questions that the petitioner had a fair and adequate opportunity to raise, and could and should have raised, during the formal trial of the cause.

At the bar of this Court counsel for the petitioner has requested the Court, in the event it denies the petition, to grant a stay of sentence to enable the petitioner to seek a review of our order by certiorari. We find no federal question involved in this controversy, and consequently the application for stay should be denied.

Accordingly, it is ordered that the petition for the writ of habeas corpus, and the application for a stay order, be and the same are hereby severally denied.

ROBERTS, *C. J.*, TERRELL, THOMAS, HOBSON, MATHEWS and DREW, *JJ.*, CONCUR.

IN THE SUPREME COURT OF FLORIDA:

I, GUYTE P. MCCORD, Clerk of the Supreme Court of Florida, do hereby certify that the foregoing and attached four pages constitute a true and correct copy of the opinion and judgment of said Court filed in said Court on November 5th, 1954, in that certain cause recently pending in said Court wherein Walter Lee Irvin was Petitioner, and L. F. Chapman, Superintendent of State Prison, was Respondent, all as the same appears among the records and files of my said office.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the Seal of said Court, at Tallahassee, the capital, on this the 10th day of November, 1954.

GUYTE P. MCCORD,
Clerk of the Supreme Court
of Florida.

(SEAL)

FILED
JAN 3 1955
HAROLD B. WILLEY, Clerk

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1954

No. 455

WALTER L. IRVIN,
PETITIONER,

v.

L. F. CHAPMAN, Superintendent
of Raiford State Penitentiary,
Raiford, Florida,
RESPONDENT.

# BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

RICHARD W. ERVIN
*Attorney General*

REEVES BOWEN
*Assistant Attorney General*
*Counsel for Respondent*

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SUPREME COURT OF THE UNITED STATES

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# BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

## QUESTIONS INVOLVED

We do not think that the question presented by the petitioner is the question to be decided by this Court. Rather, we submit that the controlling questions are as follows:

### QUESTION ONE

WHERE THE PETITIONER, REPRESENTED BY ABLE COUNSEL OF HIS OWN CHOOSING, FAILED TO RAISE KNOWN AND EXISTING QUESTIONS OF ALLEGEDLY UNCONSTITUTIONAL PROCEEDINGS IN EITHER THE STATE TRIAL COURT OR

IN THE STATE APPELLATE COURT ON APPEAL, HAS HE WAIVED SUCH QUESTIONS SO AS TO BE BARRED FROM SUBSEQUENTLY RAISING THEM BY WAY OF HABEAS CORPUS?

## QUESTION TWO

DID THE PETITION FOR HABEAS CORPUS WHICH THE PETITIONER FILED IN THE SUPREME COURT OF FLORIDA CONTAIN SUFFICIENT ALLEGATIONS AS TO THE STATE'S KNOWING USE OF FABRICATED EVIDENCE AND PERJURED TESTIMONY OR AS TO THE STATE'S CONSTRUCTIVE SUPPRESSION OF EVIDENCE, TO REQUIRE THE ISSUANCE OF A WRIT OF HABEAS CORPUS?

## SUMMARY OF ARGUMENT

UNDER QUESTION ONE: The petitioner waived the right to present on habeas corpus the questions which he now seeks to present because said questions existed and were known to him to exist at the trial and subsequent appeal and, although represented by competent counsel, he failed to assert said questions at the trial or on appeal. The Supreme Court of Florida did not treat habeas corpus as permissible.

UNDER QUESTION TWO: The petition for habeas corpus was insufficient to require the issuance of a writ of habeas corpus because an analysis of its insubstantial allegations reveals no infringement of the petitioner's right to due process of law.

## ARGUMENT

### Question One

AS TO THE PETITIONER'S WAIVER OF HIS RIGHT TO ASSERT HIS CONSTITUTIONAL CLAIMS.

It was not necessary for the respondent to file any pleading in response to the petition for writ of habeas corpus because the Supreme Court of Florida took judicial notice of its records (75 So. 2d 591, text 592; appendix to petition for certiorari, page 15) and those records showed that the petitioner was not entitled to relief by way of habeas corpus.

Those records showed that the petitioner, represented throughout by able counsel of his own choosing, waived the questions presented by the petition for writ of habeas corpus by knowingly failing to present said questions to the trial court and by knowingly failing to present them to the Supreme Court of Florida on direct appeal.

The records[1] of the Supreme Court of Florida show that the rape was committed on July 16, 1949; that on August 12, 1949 the trial court appointed counsel to represent the petitioner; that on August 22, 1949 the petitioner obtained counsel of his own choosing and ever since that date he has been represented by able counsel of his own choice at every step of the way.

AS TO THE FOOTPRINTS AND FOOTPRINT CASTS, THE RECORDS OF THE SUPREME COURT OF FLORIDA SHOW THAT:

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[1] The transcript of testimony on direct appeal to the Supreme Court of Florida, a copy of which was filed in this Court in connection with petition for certiorari to review the affirmance in that case (No. 238, Misc., Oct. Term, 1953), will be referred to as "R". The record proper filed in the Supreme Court of Florida on direct appeal will be referred to as "Tr."

Although the petitioner had full opportunity at the trial and on appeal to the Supreme Court of Florida to raise the question of whether the prosecution knowingly used fabricated evidence and perjured testimony, he did not raise said question at any time prior to the filing of his petition for writ of habeas corpus.

The state's witness James L. Yates testified that he found footprints at the scene where the prosecutrix was abducted by the negroes; that he obtained from the petitioner's mother the shoes which the petitioner said he was wearing the night the rape was committed and took the shoes to the scene and compared them with the tracks and put the shoes in the tracks; that the shoes compared exactly with the tracks; that the tracks were plain in the ground, including the writing on the heel; and that so far as he could tell the petitioner's shoes were exactly the same pair that made the tracks; that he made plaster casts of the tracks; that these casts were all right when they were introduced in evidence at the first trial but had gotten all broken to pieces in going back and forth to the Supreme Court (R. 328-334); that the shoes were identical with the tracks which he found in the ground (R. 345); that he looked and saw that those were the same tracks that fitted the shoes; that he knew that those shoes made those tracks (R. 371).

The petitioner's objection to Yates' testimony as to the tracks and casts was upon the ground that Yates was not qualified as an expert (R. 331; 343-344). He never objected on the ground that Yates had fabricated evidence or was giving perjured testimony.

The petitioner made an issue as to the authenticity of the footprints from which the casts were made by putting on as his witness one H. V. Bennett, who said

that he was a professional consulting criminologist (R. 414); that he went to Tavares to the Clerk's office in the court house and found the plaster casts (R. 418); that the casts were broken all to pieces (R. 432); that he reassembled the broken pieces; that a photograph was made of the casts (R. 433); that there was no doubt in his mind that the footprints were made by the shoes in question (R. 435); that in the left shoe he found a convex impression rather than a concave impression in the imprint in the ground and that it was his conclusion that if a person were wearing a shoe and had his weight in that shoe he would have left a concave impression in the ground; that it was his impression that the impression was made with a shoe with a shoe tree in it (R. 436).

The state rebutted defense witness Bennett's testimony with the testimony of James L. Yates (R. 446-448) and with the testimony of LeRoy Campbell, who was with Yates when the investigation was made and when Yates went to the scene of the abduction and found the footprints there, and when Yates made the casts of the footprints (R. 448-450).

The petitioner raised no question in his motion for new trial as to perjured testimony or fabricated evidence (Tr. 243-248), or in his grounds of appeal (Tr. 251-256; 259), or in any of the appeal briefs which he filed in the Supreme Court of Florida, or in his petition for rehearing. In short, he never raised the question in the trial court or in the Supreme Court of Florida on appeal.

It thus appears that the petitioner knew all of the facts with regard to these footprints and casts and, since there was no impediment in the way of his presenting the question of whether the state knowingly used fabricated evidence or perjured testimony at the trial and

on appeal, his failure to raise this question in due time bars him from raising it on habeas corpus.

AS TO THE SMEARS ON THE PETITIONER'S TROUSERS, THE RECORDS OF THE SUPREME COURT OF FLORIDA SHOW THAT:

The only objection that was made to the introduction of the petitioner's trousers in evidence was upon the ground that they were obtained by an illegal and unreasonable search and seizure. The state's witness Yates testified without objection as to the smears on said trousers. (R. 356-357). There was no objection to the introduction of the trousers in evidence, or to Yates' testimony as to the smears, upon the ground that the state had not obtained a scientific analysis of the smears.

No question was raised by the petitioner as to the state's failure to obtain a scientific analysis of said smears in his motion for a new trial (Tr. 243-248), or in his grounds of appeal (Tr. 251-256; 259), or in any of the appeal briefs filed by him in the Supreme Court of Florida, or in his petition for rehearing. No such question was ever raised by the petitioner in any manner in the trial court or in the appellate proceedings in the Supreme Court of Florida.

It thus appears that the petitioner had full knowledge of the facts regarding these smears and, since there was no impediment in the way of his raising at the trial and on the subsequent appeal the question of whether the state had violated his constitutional rights by failing to procure a scientific analysis of the smears, he waived the point by not presenting it in due time at the trial and on the appeal and he is barred from relief by way of habeas corpus.

AS TO THE COTTON OR LINT FOUND NEAR THE SCENE OF THE CRIME, THE RECORDS OF THE SUPREME COURT OF FLORIDA SHOW THAT:

The state's witness Yates testified that a handkerchief, to which a piece of cotton or lint was sticking, was found at the scene of the crime. The handkerchief, with the little piece of cotton tied up inside, was produced in court and identified. The handkerchief was introduced in evidence without objection. Yates testified without objection that the kind of cotton that he found on the handkerchief was all over the back seat and floorboards of the car identified by the prosecutrix as being the car in which she was raped; that evidently the upholstery had been torn up and was leaking out this cotton or lint; that the cotton and lint which appeared on the back seat of the car appeared to be the same material that he found clinging to the handkerchief. (R. 354-356).

The petitioner did not raise any question about the state having constructively suppressed evidence by refusing to obtain a scientific analysis of the lint in his motion for new trial (Tr. 243-248), or in his grounds of appeal (Tr. 251-256; 259), or in any appeal brief filed by him in the Supreme Court of Florida, or in the petition for rehearing which he filed in said Court. He never raised any such question at any time in the trial court or in the appeal proceedings in the Supreme Court of Florida.

Therefore, it appears that the petitioner knew all of the facts and, since there was no impediment in the way of his raising in the trial court and on the subsequent appeal the question of whether the state had violated his constitutional rights by not obtaining a scientific analysis of said cotton or lint, he waived the point by

not presenting it in due time at the trial and on the appeal and is barred from raising it on habeas corpus.

AS TO THE PLASTER CASTS OF THE TIRE TRACKS, THE RECORDS OF THE SUPREME COURT OF FLORIDA SHOW THAT:

The state's witness Yates testified that the casts which he made of the automobile tire tracks compared with the tracks on the tires themselves; that the imprints of which he made the casts compared exactly with the treads on the tires of the car; and that the tire tracks compared exactly with the treads on the tires on the automobile (R. 352-353). No objection was made to this testimony except upon the ground that Yates had not been qualified as an expert (R. 343-344). The casts were admitted into evidence without objection (R. 450).

The automobile belonged to James Sheppard (R. 382-386). It was brought to the court house before the first trial and was later turned back to James Sheppard (R. 352). Neither it nor the tires which were on it at the time of the commission of the crime were offered in evidence.

The petitioner raised no question as to constructive suppression of evidence because of the state's failure to obtain a scientific analysis with regard to these tire tracks and casts in his motion for new trial (Tr. 243-248), or in his grounds of appeal (Tr. 251-256; 259), or in any brief filed by him in the appeal proceedings in the Supreme Court of Florida, or in the petition for rehearing which he filed in said Court. He never raised any such question at any time in either the trial court or in the appellate proceedings in the Supreme Court of Florida.

It therefore appears that the petitioner had full knowledge of the facts concerning the tire tracks and casts, and, since there was no impediment in the way of his raising at the trial and on the subsequent appeal the question of whether the state had violated his constitutional rights by not obtaining a scientific analysis, he waived the point by not presenting it in due time at the trial and on appeal and is barred from raising it on habeas corpus.

AS TO THE STATE'S FAILURE TO PRODUCE THE TESTIMONY OF THE MEDICAL DOCTOR WHO EXAMINED THE PROSECUTRIX SHORTLY AFTER THE RAPE WAS COMMITTED, THE RECORDS OF THE SUPREME COURT OF FLORIDA SHOW THAT:

At no time during the trial did the petitioner raise any question about the state having suppressed evidence by failing to have the medical doctor testify who examined the prosecutrix shortly after the rape. He raised no such question in his motion for a new trial (Tr. 243-248), or in his grounds of appeal (Tr. 251-256; 259), or in any brief filed by him in the appellate proceedings in the Supreme Court of Florida, or in the petition for rehearing which he filed in said Court. He never at any time raised any such question in the trial court or in the appellate proceedings in the Supreme Court of Florida.

The petition for writ of habeas corpus made no claim that the petitioner and his counsel were unaware of this medical examination, and of the results thereof, in ample time to have raised the question in the trial court and in the Supreme Court of Florida on appeal. For all that the petition shows, the petitioner and his counsel knew that the medical doctor had examined the rape

victim and knew the results of the examination. The petition impliedly concedes that he had this knowledge because it says that "the state engaged in a constructive suppression of evidence by *refusing* to have the medical doctor testify . . ." (Appendix to petition for certiorari, page 9). This is not a mere allegation that the state *failed* to have the medical doctor testify. The word "refusing" must be assumed to have been knowingly used by the petitioner's able counsel and it should be given its usual and ordinary meaning.

This is not a case where a defendant was not represented by counsel when the petition for habeas corpus was drawn and therefore could be excused for not alleging that the matters regarding the medical doctor were unknown to him and his counsel at the time of the trial and subsequent appeal. Here we have a man who was represented by counsel whose abilities are recognized by this Court, and the utter failure of such counsel to make a showing in the petition for habeas corpus that these matters were unknown to counsel and to the petitioner at the time of the trial, in time to take advantage of the point at that trial and on the later appeal, can only be construed as an admission that the facts were known to the petitioner and his counsel all the way along. Because of the fact that the petitioner was represented by eminent counsel, this is peculiarly a case for the application of the rule of law that a pleading must be construed most strongly against the pleader, and it must be assumed that the petition for habeas corpus did not allege that he and his counsel were ignorant of the facts at the time of the trial and later appeal because he could not truthfully make such an allegation. To award a writ of habeas corpus to a defendant who is represented by astute legal counsel despite his failure to make out a prima facie case by alleging that he did not learn

of the matters alleged in his petition for habeas corpus in time to avail himself of them at his trial and on his subsequent appeal would be to make a shambles of orderly and fair court procedures and would permit such a defendant to trifle with the state court's judgments; it would permit such a defendant to delay and impede the execution of state court judgments by designedly omitting to allege matters essential to his ultimate success, for the purpose of obtaining a writ of habeas corpus which he knows he ought not to have. There is no excuse for the petitioner's failure to so allege, *if* he could truthfully have done so. He should not be permitted to trifle with the judgment of the courts of the State of Florida in any such fashion.

Therefore, since the petitioner at no time during the trial and subsequent appeal made any claim that the state had suppressed the evidence of the medical doctor by not calling him to testify, he waived the point and is barred from raising it on habeas corpus.

AS TO THE SHERIFF'S KILLING OF THE PETITIONER'S CODEFENDENT SAMUEL SHEPHERD:

The petitioner's affidavit which is attached to his petition for habeas corpus in the Supreme Court of Florida (pages 12-13 of the appendix to the petition for certiorari) shows that the sheriff killed Samuel Shepherd on November 6, 1951. It appears by the appeal record on file in the Supreme Court of Florida that the petitioner's trial was held in February, 1952. Yet, it appears by said record that at said trial the petitioner raised no question about said killing having resulted in the suppression of evidence which Shepherd might have given at the trial in behalf of the petitioner. Said record shows that he did not raise any such question in his motion for new trial (Tr. 243-248), or in his

grounds of appeal (Tr. 251-256; 259), or in any brief filed by him in the appellate proceedings in the Supreme Court of Florida, or in the petition for rehearing which he filed in said Court, or at any time in either the trial court or in the appellate proceedings in the Supreme Court of Florida.

It therefore appears that the petitioner had full knowledge of the facts concerning the killing of Samuel Shepherd and that at the trial and on appeal he could have raised in due time the question of whether his constitutional rights had been infringed and, there having been no impediment in his path, his failure to so present the point operated as a waiver thereof and he is now barred from raising it.

If, in the event of a denial of certiorari in this court, the petitioner would not be entitled to succeed in a later habeas corpus suit brought in a Federal court, then he is not entitled to a writ of certiorari in this cause, since the same constitutional objections to his conviction may be raised in a Federal habeas corpus suit that may be raised upon the pending application for certiorari. Therefore, what this Court has said in deposing of writs of certiorari to review the rulings of Federal courts in habeas corpus cases attacking the validity of state convictions upon constitutional grounds is pertinent, and we quote from Brown v. Allen, 344 U. S. 443, text 485-487, as follows:

> "The writ of habeas corpus in federal courts is not authorized for state prisoners at the discretion of the federal court. It is only authorized when a state prisoner is in custody in violation of the Constitution of the United States. 28 USC § 2241. *That fact is not to be tested by the use of habeas corpus in lieu of an appeal. To allow habeas corpus in such*

*circumstances would subvert the entire system of state criminal justice and destroy state energy in the detection and punishment of crime.*

"Of course, federal habeas corpus is allowed where time has expired without appeal when the prisoner is detained without opportunity to appeal because of lack of counsel, incapacity, or some interference by officials. Also, this Court will review state habeas corpus proceedings even though no appeal was taken, if the state treated habeas corpus as permissible. Federal habeas corpus is available following our refusal to review such state habeas corpus proceedings. *Failure to appeal is much like a failure to raise a known and existing question of unconstitutional proceeding or action prior to conviction or commitment. Such failure, of course, bars subsequent objection to conviction on those grounds.*

"North Carolina has applied its law in refusing this out-of-time review. This Court applies its jurisdictional statute in the same manner. Preston v. Texas, 343 U S 917, 933, 96 L ed 1331, 72 S Ct 649; cf, Paonessa v. New York, No. 133 Misc, this Term, certiorari denied October 20, 1952 (344 U S 860, post, 667, 73 S Ct 99), because 'application therefor was not made within the time provided by law.' *We cannot say that North Carolina's action in refusing review after failure to perfect the case on appeal violates the Federal Constitution. A period of limitation accords with our conception of proper procedure.*

"Finally, federal courts may not grant habeas corpus for those convicted by the state except pursuant to § 2254. See note 17, supra. See also note 2, supra. We have interpreted § 2254 as not requiring repetitious applications to state courts for collateral relief, p. 413, supra, but clearly the state's procedure for relief must be employed in order to avoid the use of federal habeas corpus as a matter of procedural routine to review state criminal rul-

ings. *A failure to use a state's available remedy, in the absence of some interference or incapacity, such as is referred to just above at notes 32 and 33, bars federal habeas corpus. The statute requires that the applicant exhaust available state remedies. To show that the time has passed for appeal is not enough to empower the Federal District Court to issue the writ.* The judgment must be affirmed." (Italics supplied).

We also quote footnote 24 to Brown v. Allen (text 480) as follows:

"Evidence in state criminal proceedings to support objections on federal constitutional grounds, known to state defendants and their counsel, or easily ascertainable, cannot be withheld or neglected at the state trial and used later to support habeas corpus. State criminal proceedings would be unreasonably hampered. Ex parte Spencer, 228 U S 652, 660, 57 L ed 1010, 1013, 33 S Ct 709; Re Wood, 140 U S 278, 285, 35 L ed 505, 508, 11 S Ct 738; Crowe v. United States (CA4th NC) 175 F 2d 799; Price v. Johnston, 334 U S 266, 289, 92 L ed 1356, 1371, 68 S Ct 1049, and the dissent."

We submit that the foregoing quotations from Brown v. Allen sustain our position that the petitioner's failure to raise in due time the questions sought to be raised on habeas corpus bars him from relief by way of habeas corpus.

It may be that the petitioner will contend that the Supreme Court of Florida treated habeas corpus as permissable and that therefore he is entitled to a review at the hands of this Court even though the questions presented in his habeas corpus petition were not presented at the trial or on appeal to the Supreme Court of Florida. We submit that the Supreme Court of Florida did not treat habeas corpus as permissible.

In support of the denial of habeas corpus on the ground that the sheriff's killing of Samuel Shepherd had resulted in a constructive suppression of evidence, the Supreme Court of Florida said that ". . . the petitioner is forclosed from now raising the question as to what testimony Shepherd might have given at the second trial..." and cited State ex. rel. Johnson v. Mayo, 69 So. 2d 307 (See 75 So. 2d 591, text 592; appendix to petition for certiorari, pages 15-16). The gist of the holding in the Johnson case was that a petitioner for habeas corpus who had previously had full opportunity to raise constitutional questions affecting the validity of his conviction, forfeits or waives his right to raise such issue and cannot successfully urge it in habeas corpus proceedings. We quote as follows from the opinion of the Supreme Court of Florida in the Johnson case:

> "But aside from this aspect of the petition, there is still another reason why the writ of habeas corpus should not be granted. *It is elementary that a writ of habeas corpus cannot be used as a substitute for appeal,* motion to quash or a motion in arrest of judgment. State ex rel. Linick v. Coleman, 144 Fla. 458, 198 So. 100; Skipper v. Schumacher, 124 Fla. 384, 169 So. 58, certiorari denied 299 U.S. 507, 57 S. Ct. 39, 81 L.Ed. 376; Collingsworth v. Mayo, Fla., 37 So. 2d 696; Harlan v. McGourin, 218 U.S. 442, 31 S. Ct. 44, 54 L. Ed. 1101, 21 Ann. Cas. 849. In the instant case *the petitioner was represented throughout the course of his trial by competent counsel* who presented a vigorous defense to the criminal charge lodged against him. *The same attorneys represented him on the appeal.* The judgment and sentence of the court below were affirmed by this Court on October 24, 1952, after extensive briefs had been filed and full oral arguments had on the issues. See Johnson v. State, Fla., 61 So. 2d 179.

* * * * *

"*At no time during any of the aforementioned proceedings did the petitioner raise or suggest the ground now asserted in his petition for writ of habeas corpus, although throughout the entire period he has been represented by competent counsel.* He had the opportunity to raise the issue by motion for new trial, section 920.02(1), Florida Statutes 1951, F.S.A., and at the time the trial judge inquired of him before adjudication of guilt and sentence whether he had anything to say why the sentence of the law should not be pronounced against him; section 921.13, Florida Statutes 1951, F.S.A., or to raise it in his petition for leave to apply to the trial court for a writ of error coram nobis. Lamb v. State, 91 Fla. 396, 107 So. 535; Hysler v. State, 315 U.S. 411, 316 U.S. 642, 62 S. Ct. 688, 86 L. Ed. 932.

"In the petition for the writ of habeas corpus the petitioner has not made any attempt to give a reason for his failure to raise in prior proceedings the grounds now asserted for the first time in his petition for habeas corpus. Therefore, it must be held, under the decisions, that *he has waived or forfeited the right to raise the issue by his failure to make timely assertion thereof.* Baker v. State, 150 Fla. 446, 7 So. 2d 792; Jennings v. Illinois, 342 U.S. 104, 72 S. Ct. 123, 96 L.Ed. 119; Frisbie v. Collins, 342 U.S. 519, 72 S. Ct. 509, 96 L. Ed. 541; Cochran v. State of Kansas, 316 U. S. 255, 62 S. Ct. 1068, 86 L. Ed. 1453." (Italics supplied).

Having stated that the petitioner was foreclosed from raising the question, and having cited the Johnson case, which hinged on waiver, in support of its rejection of the claim that the petitioner was entitled to habeas corpus because of the sheriff's killing of Samuel Shepherd, it clearly appears that the Supreme Court of Florida held that habeas corpus was not permissible, the petitioner having waived the right to invoke habeas corpus because of his failure to present the question on direct appeal.

As to the claim that the state constructively suppressed evidence by refusing to produce the medical doctor as a witness, the Supreme Court of Florida specifically stated that the petitioner ". . . has waived or forfeited the right to raise the issue by his failure to make timely assertion thereof. State ex rel. Johnson v. Mayo, supra." (See 75 So. 2d 591, text 593; appendix to petition for certiorari, page 17). Therefore, it is apparent that the Supreme Court of Florida did not treat habeas corpus as permissible but, to the contrary, specifically held that it was not permissible because the petitioner had waived his right to raise the issue.

As to the other claims made by the petition, viz., that the state knowingly used footprint casts which were patently false and knowingly contrived by state officials, and that the state constructively suppressed evidence by refusing to obtain scientific analyses of the smears on the petitioner's trousers, the lint found near the scene of the crime, and the plaster casts of the tire tracks, the Supreme Court of Florida dealt with these matters as follows (75 So. 2d 591, text 592; appendix to petition for certiorari, pages 14-15):

> "From a study of the petition it appears that, with the exception of the matters hereinafter noted, the petitioner has alleged no facts in his petition that have not heretofore been set at rest by this Court on an appeal from the judgment and sentence entered in the original cause. See Irvin v. State, Fla., 66 So. 2d 288, certiorari denied 346 U.S. 927, 74 S. Ct. 316, 98 L. Ed.____, rehearing denied 347 U.S. 914, 74 S. Ct. 479, 98 L.Ed. ____. Therefore, such matter is not now open for adjudication."

Since these questions were never raised at any time in the trial court or in the Supreme Court of Florida on appeal, and since said Court did not deal with them

or decide them on appeal (See Irvin v. State, 66 So. 2d 288), the said Court's statements that ". . . the petitioner has alleged no facts in his petition that have not heretofore been set at rest by this Court on appeal from the judgment and sentence entered in the original cause. * * * Therefore, such matter is not now open for adjudication", recognized that the petitioner had waived the questions by not presenting them on direct appeal and was a holding that habeas corpus was not permissible.

The result is that the petitioner, represented by competent counsel, waived his claims by not presenting them in due course to the trial court and to the Supreme Court of Florida on appeal and is therefore not entitled to a review by this Court.

**Question Two**

AS TO THE FAILURE OF THE PETITION FOR HABEAS CORPUS TO MAKE OUT A CASE REQUIRING THE ISSUANCE OF A WRIT:

We submit that the petitioner's allegations as to the state's knowing use of fabricated evidence and perjured testimony and as to the state's constructive suppression of evidence were insufficient to show a violation of his constitutional right to due process and were therefore insufficient to require the issuance of a writ of habeas corpus.

In attempting to charge that the state knowingly used fabricated evidence and perjured testimony, the petition for writ of habeas corpus alleged (appendix to petition for certiorari, page 7):

"D. Petitioner was convicted by the use of evidence which was patently false and knowingly contrived by state officials.

> "The footprint casts made by Deputy Sheriff Yates are patently false because it is impossible that the original footprints, from which the casts were made, were made by a shoe with a foot in it. The sole of every shoe when worn on the foot makes a concave impression on the ground. The footprints which were the subject of the testimony at the trial were convex, and thus necessarily false and contrived (R. 436, 437). By knowingly using such evidence, the State deprived petitioner of a fair trial and thus denied him due process of law."

It is to be noted that the petitioner cited as the only authority for his claim pages 436 and 437 of the record, which pages evidence the testimony of defense witness Bennett at the trial to the effect that the sole of every shoe worn on the foot makes a concave impression on the ground but that in the cast of the left shoe he found a convex impression and that it was his impression that the impression was made with a shoe with a shoe tree in it.

By presenting this evidence to the jury, the petitioner made an issue as to whether the footprints of which the casts were made were genuine or whether they were contrived and as to whether Deputy Sheriff Yates, who discovered the footprints and made the casts, testified falsely. The state produced the testimony of Yates and of LeRoy Campbell to show that the footprints of which the casts were made were genuine and not fabricated. The jury resolved the issue against the petitioner and there was no valid reason why they were not entitled to do so.

Even if the jury's verdict had not settled the matter contrary to the petitioner's contention, the basis of the petitioner's claim is the allegation that the evidence was fabricated because, while the footprint of which the

casts were made was convex "The sole of *every* shoe when worn on the foot makes a concave impression on the ground", and this allegation is manifestly contrary to the facts of life and hence insubstantial. The courts know what everybody else knows, that is to say, that the kind of impression made by the sole of a shoe on the ground when worn on the foot depends upon numerous factors, among them the kind of soil in which the imprint is made, whether the person wearing the shoe is standing still or walking or running, the kind of shoe he is wearing, whether the shoe has a stiff sole or a limber sole, whether his foot is deformed and where his weight rests on the shoe sole at the time the imprint is made. It may well be that the soles of *some* shoes when worn on the foot make concave impressions, but not so as to *every* shoe worn on the foot. Therefore, since the basic allegation is patently contrary to the facts, the claim is too insubstantial to require the issuance of a writ of habeas corpus.

Furthermore, there was no allegation that the prosecuting attorney knew that this evidence was false and contrived.

The allegations that the state engaged in a constructive suppression of evidence by refusing to obtain scientific analyses of the raw physical evidence (smear on trousers, lint, plaster casts of tire tracks) when such scientific analysis was available to local law enforcement officials (appendix to petition for certiorari, pages 8-9,) is patently a non sequitur. It cannot logically be said that the state *suppresses* evidence which it does not have and which doesn't exist. The fact that the state did not obtain all of the evidence which it might have been possible to obtain is in no sense a suppression of evidence. The evidence which the state did produce was

legally admissible. What the petitioner would have this Court hold is that even though he was convicted on the basis of competent, legally admissible evidence sufficient to justify the conviction, his constitutional rights were infringed because the state did not go further and obtain and produce further evidence. He is not entitled to such a holding. And this is doubly so in view of the complete lack of showing that the petitioner made any effort to obtain scientific analyses under court order or otherwise. The fact that Mr. Perkins, of counsel for the petitioner, had a court order which allowed an examination of the evidence in the case (R. 419) and that under this order defense witness Bennett examined the footprint casts and shoes and testified about them in court, shows that there was no suppression of evidence on the part of the state.

As to the allegations that Sheriff McCall's deliberate killing of Samuel Shepherd resulted in the suppression of evidence which Samuel Shepherd could have given on behalf of the petitioner herein and which would have proved petitioner's innocence of the crime with which he was charged (appendix to petition for certiorari, pages 5 and 9), these allegations were manifestly insufficient to show that the state violated the petitioner's constitutional rights by suppressing available evidence which might have benefitted him. The killing of Samuel Shepherd occurred several months before the trial and the petition does not even suggest that Sheriff McCall killed Shepherd for the purpose of or with any intention of preventing Shepherd from testifying in the petitioner's behalf. Moreover, the allegation that Shepherd *could* have testified in the petitioner's behalf if he had been alive at the time of the trial falls far short of showing that he *would* have done so. Also, the allegation that Shepherd's testimony would have proved peti-

tioner's innocence is far fetched; if he had been alive he might, if he chose to do so, have testified in the petitioner's behalf but that would have been far short of proving the petitioner's innocence.

Furthermore, it cannot rightly be said that Shepherd's testimony was suppressed because, as the Supreme Court of Florida pointed out (Irvin v. Chapman, 75 So. 2d 591, text 592; appendix to petition for certiorari, page 15) Shepherd testified in full detail at the first trial as to his and the petitioner's activities and the petitioner had the unquestioned right to present Shepherd's said testimony at the second trial which resulted in the conviction now under attack.

As to the claim that the state engaged in a constructive suppression of evidence by refusing to have the medical doctor testify who had examined Norma Padgett shortly after the rape was supposed to have occurred and that "... the petitioner based upon information and belief, *believes* that the state suppressed the testimony of the medical doctor because the said medical doctor would have testified that Norma Padgett had not been raped", these allegations are wholly insufficient to show that the state suppressed any evidence which would have benefitted the petitioner. The mere allegation, *upon information and belief,* that the petitioner *believes* that the medical doctor would have testified that Norma Padgett had not been raped did not even begin to allege that in fact the medical doctor would have so testified or that he knew anything which would have benefitted the petitioner. The most that he alleged was that somebody had informed him that the state suppressed the testimony of the medical doctor because he would have testified that Norma Padgett had not been raped, and that the petitioner believed it. There is absolutely no showing upon

which it could even remotely be inferred that his informant had any knowledge whatsoever as to what the medical doctor would have testified, or that the informant had any information even reportedly having its origin in any statement made by the medical doctor or by the raped woman, or that the informant had the slightest justification, even upon the basis of hearsay several times removed, for saying that the medical doctor would have testified that Norma Padgett had not been raped. The petition does not show any basis for the belief and therefore does not exclude the idea that it is purely fanciful. Least of all does it show that the medical doctor himself, who presumably had been available to the petitioner's counsel at all times for an interview, had ever indicated to anybody that if he had been called as a witness at the trial he would have testified that Norma Padgett had not been raped. The petitioner could not have advanced a more insubstantial claim.

Therefore we submit that on the merits the petition for habeas corpus was wholly insufficient to show that the state knowingly used fabricated evidence or perjured testimony or that the state suppressed evidence beneficial to the petitioner and that therefore the petition was insufficient to require the issuance of a writ of habeas corpus.

## CONCLUSION

In conclusion, we submit that the petition for writ of certiorari should be denied.

Respectfully submitted,

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